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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 698-48

ROSE STAUB, *Appellant*

v.

CITY OF BAXLEY, *Appellee*

On Appeal From the Court of Appeals of the State of Georgia

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

J. H. HIGHSMITH,
Baxley, Georgia,
Attorney for Appellee.

December 27, 1956.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 602

ROSE STAUB, *Appellant*

v.

CITY OF BAXLEY, *Appellee*

On Appeal From the Court of Appeals of the State of Georgia

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

Appellee, pursuant to Rule 16(b) of the Revised Rules of the Supreme Court of the United States, moves that the appeal be dismissed or the judgment of the court below affirmed on the ground that the federal question sought to be reviewed was not properly raised, or expressly passed on and that the judgment rests on an adequate non-federal basis.

STATEMENT

Appellant was prosecuted for soliciting membership in the International Ladies' Garment Workers' Union without a permit in violation of the ordinance of the

City of Baxley which appears on pages 3-5 of her Jurisdictional Statement. She filed a plea in abatement of the prosecution, setting out as her sole defense that the ordinance was unconstitutional. The plea attacked the ordinance as a whole; it made no attack against any specific section of the nine sections contained in the ordinance. She was convicted.

She appealed the judgment of conviction to the Superior Court of Appling County, Georgia, by way of writ of certiorari as required by Georgia practice. The writ of certiorari, like the plea in abatement, attacked the ordinance as a whole and contained no attack on any specific section. The conviction was affirmed by the Superior Court without an opinion. From the judgment of the Superior Court appellant brought a writ of error to the Court of Appeals of Georgia. The Court of Appeals refused to consider or decide the constitutional question for the following reason (Jurisdictional Statement, App. p. 40):

> "It will be noted that counsel for the defendant in each instance attacks the ordinance as a whole. The attack should have been made against specific sections of the ordinance and not against the ordinance as a whole. In Anthony v. City of Atlanta, 66 Ga. App. 504, 505 (18 S. E. 2d 81), this court said: 'It is well settled that one or more sections of an ordinance may be unconstitutional and other sections constitutional; and where the allegations as to the unconstitutionality of an ordinance fail to definitely state what section of the ordinance is unconstitutional, such allegations are too indefinite to raise any question for decision as to the unconstitutionality of the ordinance. Glover v. Rome, 173 Ga. 239 (160 S. E. 249), and cit.' "

Appellant makes no claim that she did comply with this reasonable and well-established rule of Georgia practice, or that she properly and specifically defined her constitutional challenge to the ordinance. The only comment which appellant makes with respect to the above ground for the procedural decision against her is the following (Jurisdictional Statement, p. 12):

> "No contention of this character had been advanced by the City either in the Mayor's Court or in the Superior Court; no suggestion of it appears in the otherwise full answer filed by the City in the Superior Court (Tr. 51-52). A motion for rehearing was denied by the Court of Appeals and an application for certiorari was denied by the Georgia Supreme Court . . ."

The above statement is erroneous. The fact is that after prosecution of the appellant was commenced she brought a declaratory judgment proceeding in the Superior Court of Appling County to declare the ordinance invalid. In that proceeding no written briefs were filed by either party, but counsel for appellee fully argued the contention that the appellant had not properly raised the unconstitutionality of the ordinance because she had attacked the ordinance as a whole and not specific sections.

The declaratory judgment proceeding was appealed to the Supreme Court of Georgia. The question of the failure of appellant to attack specific questions was again argued in a written brief filed before the Supreme Court and in oral argument. An excerpt from the brief filed by the counsel for the City of Baxley in the Supreme Court arguing this question is incor-

porated in the statement by counsel and attached as an Appendix hereto (*infra* pp. 9-10).

After the Supreme Court had affirmed the dismissal of the appellant's declaratory judgment proceeding on the ground that the question of unconstitutionality could be raised on trial for the offense, the criminal proceeding was tried before the Mayor's Court. Again, in spite of the invocation by the City's attorney of the rule requiring specificity in the previous declaratory judgment proceeding, appellant attacked the constitutionality of the ordinance as a whole without reference to any specific section. She was convicted. She appealed to the Superior Court. When the case came on for hearing in the Superior Court, counsel agreed that no further argument was necessary. Both sides rested their case on the oral argument previously made in the declaratory judgment proceeding before the Superior Court (see letter attached to the Appendix, *infra* p. 11). As we pointed out above, in that previous argument the procedural question had been raised and fully argued. Finally, it is conceded by appellant that the same procedural question was raised by appellee before the Court of Appeals in Georgia.

To sum up, the procedural issue on which the Court of Appeals decided the case without considering the constitutionality of the ordinance was raised by appellee on every possible occasion.[1] Appellant chose to ignore it and did not seek to amend her pleadings.

---

[1] Appellant's statement quoted above that ". . . no suggestion of it [the procedural point on which the case was decided] appears in the otherwise full answer filed by the City in the Superior Court" is true but has no relevance. The answer of the Mayor under Georgia practice was solely a pleading as to the facts. It did not and was not intended to raise any points of law. Such questions under Georgia practice are properly raised on argument of counsel.

ARGUMENT

1. It is clear from the record that the Court of Appeals of Georgia decided the case on a procedural ground. This is a matter of state law. The decision therefore rests on an adequate non-federal basis. The fact that the Georgia courts declined at this stage to give effect to appellant's claimed constitutional rights because not properly raised or presented under Georgia's "established system of practice and pleading . . . is not a denial of a Federal right which this court can review", *Atlantic Coast Line Rd. Co.* v. *Mims,* 242 U. S. 532, 536-537 (1917). See also *Layton* v. *Missouri,* 187 U. S. 356, 361 (1902); *Nevada-California-Oregon Ry.* v. *Burrus,* 244 U. S. 103, 105 (1917).

The Georgia requirement of specificity with respect to constitutional claims is well established. It finds support in the traditional rule in favor of deciding serious issues of constitutionality only when properly presented and unavoidable. Compare *United States* v. *Rumely,* 345 U. S. 41 (1953). "[I]nsufficiency of the specification" of unconstitutionality is therefore an appropriate ground for the Georgia Supreme Court to decline review, as this Court has already recognized; in such a case the "federal question [is] never properly presented to the state supreme court", *Herndon* v. *Georgia,* 295 U. S. 441, 443 (1935). See also *Harding* v. *Illinois,* 196 U. S. 78, 85-87 (1904).

In such a case, where the local court justly and properly fails to decide the constitutional issue, this Court will deny review. No federal question has been raised or determined. *Atlantic Coast Line Rd. Co.* v. *Mims, supra; Layton* v. *Missouri, supra.*

2. The only reason which appellant gives to escape the application of this principle to her case is that she

was caught by surprise and had no warning that the procedural issue would be raised until the argument in the Court of Appeals. This, as we have shown, is not true. However, if it were true it would not aid appellant. Local and federal courts alike are traditionally rigorous in declining to decide constitutional questions where non-constitutional issues are decisive. Because of the delicacy of a constitutional challenge, an alternative ground may be invoked, even against the wishes of both parties. *Peters* v. *Hobby,* 349 U. S. 331 (1955).

The decisions of this Court clearly establish the rule that a constitutional question will not be decided by this Court on an appeal from a state court which has decided the case on the basis of local law or procedure. This principle applies here and for that reason the appeal should be dismissed.

3. While it may not be strictly relevant nevertheless counsel for appellee desires to point out that as a practical matter the organizational efforts of the International Ladies' Garment Workers' Union in the City of Baxley will not be unduly restrained if this appeal is dismissed. This is because counsel for appellee, who has been City Attorney for twenty years, has advised the Mayor and Council that Section VI of the ordinance requiring large payments of money by paid organizers is unconstitutional and no attempt should be made to enforce it. The fact of the matter is that no such attempt has ever been made in the past.

Therefore, if a permit is applied for, the sole question will be the responsibility and integrity of the union's representative. With respect to this issue

counsel for appellee is prepared to advise the Mayor and City Council that he has no question as to the responsibility and integrity of the appellant and the union which she represents. In the opinion of counsel the permit would have been granted without cost had the union seen fit to apply for it when it began its organization activities. He is equally confident that if a permit is sought at the present time it will be issued without cost.

The City of Baxley has not invoked or applied the ordinance of local regulation in any unreasonable fashion against organized labor or against the organizational campaigns of any other group. It does not intend to do so.

Respectfully submitted,

J. H. HIGHSMITH,
Baxley, Georgia,
Attorney for Appellee.

December 27, 1956.

APPENDIX

Statement of J. H. Highsmith

J. H. Highsmith, in support of the Motion to Dismiss, makes the following statement:

1. He is Attorney for the City of Baxley and has represented it throughout this entire proceeding. The initial hearing in this matter was before Judge Douglas F. Thomas of the Superior Court of Appling County, Georgia, on demurrer to a declaratory judgment action. No written briefs were filed but he as counsel for the city orally argued before the court that the question of constitutionality of the ordinance could not be reached because the attack was upon the ordinance as a whole and not upon specific sections.

2. On appeal from the dismissal of the declaratory judgment action he argued the same point, both in brief and oral argument, before the Supreme Court of Georgia. Relevant excerpts from the City's brief filed before the Supreme Court read as follows:

> "As above set forth the ordinance in question consists of nine sections. The petition of plaintiffs does not point out any particular section as unreasonable or unconstitutional but attacks the ordinance as a whole on such grounds. . . .
>
> "In the case of Anthony v. City of Atlanta, 66 Ga. App. 504 the defendant was convicted in the Recorder's Court of the City of Atlanta of violating Section 1 of an ordinance of the City known as the 'Beauty Shop Ordinance'. In the opinion at page 505, it is stated as follows:
>
> > 'The defendant contended before the recorder that he was not guilty and also that the ordinance was unconstitutional and unauthorized by the City's charter. However, this attack on the ordinance, as shown by the petition for certiorari, was not definitely directed against Section 1 of the ordinance, but against the ordinance as a whole. It is well settled that one or more sections of an ordinance

> may be unconstitutional and other sections constitutional; and where the allegations as to the unconstitutionality of a ordinance fail to definitely state what section of the ordinance is unconstitutional, such allegations are too indefinite to raise any question for decision as to the unconstitutionality of the ordinance.' "

The brief also cites the following cases: *Joseph* v. *Mayor and Aldermen of Milledgeville,* 97 Ga. 513; *Rooks* v. *Tindall,* 138 Ga. 863 (2); *Hazelton* v. *City of Atlanta,* 144 Ga. 775 (4).

3. When the case again came before the same judge of the Superior Court which had decided the original declaratory judgment action counsel agreed that no further argument should be made and that the case be left for decision on the same issues that had been raised in the previous argument. This is evidenced by the attached letter from Leon A. Wilson II, then counsel for appellee.

4. As appears by the record, the same question was raised in the Court of Appeals both on briefs and oral argument.

J. H. HIGHSMITH

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September 28, 1954

Mr. J. H. Highsmith
Attorney at Law
Baxley, Georgia

Re: Staub, et al.

Dear Jap:

This will acknowledge receipt of your letter of the 27th regarding answer filed in certiorari of above cases.

Of course, it is perfectly agreeable with us for you to prepare the answer for the Mayor, and in the event that you think it necessary, please prepare a short stipulation to that effect which we will execute before proceeding with the case. As you know, we are always willing to waive technicalities, if it will make the job easier.

I agree that your answer renders only the decision of law necessary. Since we have argued the law applicable to the case at great length in the recently affirmed case, I see no reason to subject the court to the same thing again. We will, of course, insist upon our position, but will allow the Judge to enter judgment in accordance with his previous decision, and will not expect to argue the case.

I plan to appear on the first day of your October Term. If this is not convenient, please let me know and I will meet at any time you desire.

With kind personal regards, I am,

Very truly yours,

LEON A. WILSON II